

REMARKS

Claims 3-11 and 33-70 are pending. In the October 16, 2008 Office Action the Examiner rejected Claims 3-11, 33, 34, 40, 41, 45, 46, 52, 53, 58, 59, 66, and 67 under 35 U.S.C. § 103(a) as being obvious over U.S. Patent Publication No. 20010054008 A1 to Miller in view of U.S. Patent Publication No. 20030055723 A1 to English. Claims 35-39, 47-51, and 61-65 stand rejected under 35 U.S.C. § 103(a) as being obvious over Miller in view of English, and further in view of U.S. Patent Publication No. 20020147657 to Callender. Claims 42, 54, and 68 stand rejected under 35 U.S.C. § 103(a) as being obvious over Miller in view of English, and further in view of U.S. Patent No. 5,960,411 to Hartman. Claims 43, 44, 55-57, 69, and 70 stand rejected under 35 U.S.C. § 103(a) as being obvious over Miller in view of English, and further in view of U.S. Patent No. 7,296,053 to Abdulhayoglu.

In addition, Claims 34, 35, 40, 43, 44, 45, 46, 47, 52, 55-57, 69, and 70 stand rejected under 35 U.S.C. § 112. Claims 7-11, 46-54, and 56 stand rejected under 35 U.S.C. § 101.

Discussion of the Rejections under 35 U.S.C. § 112 and 35 U.S.C. § 101

In order to expedite allowance of the application, Claims 34, 35, 40, 43, 44, 45, 46, 47, 52, 55-57, 69, and 70 have been amended in accordance with the Examiner's comments to overcome the rejections under 35 U.S.C. § 112. Applicants therefore respectfully request that the rejections under 35 U.S.C. § 112 be withdrawn.

Although Applicants respectfully maintain that the claims as previously pending claimed patentable subject matter under 35 U.S.C. § 101, in order to expedite allowance of the application, Claims 7-11, 46-54, and 56 have been amended as suggested by the Examiner. Applicants therefore respectfully request that the rejections under 35 U.S.C. § 101 be withdrawn.

Discussion of the Rejections under 35 U.S.C. § 103

As set forth below, Applicants have traversed the rejections of the pending claims under Section 103(a). The cited art relied on in the Office Action does not disclose or suggest all of the limitations of the pending claims, as amended. Nor does the Office Action explain why the differences between the pending claims and the cited art would have been obvious to one of ordinary skill in the art. "With regard to rejections under 35 U.S.C. § 103, the examiner must provide evidence which as a whole shows that the legal determination sought to be proved (i.e., the reference teachings establish a prima facie case of obviousness) is more probable than not."

MPEP §2142. Accordingly, “the key to supporting any rejection under 35 U.S.C. § 103 is the clear articulation of the reason(s) why the claimed invention would have been obvious.” MPEP §2142; *see KSR International Co. v. Teleflex, Inc.*, 550 U.S. ___, (2007)).

Claims 3, 6, 7, 9, and 58

The Office Action rejected Claims 3, 6, 7, 9, and 58 as a group. Each claim is addressed below.

Independent Claim 3

The Office Action rejects Claim 3 under 35 U.S.C. § 103(a) as allegedly being obvious over Miller in view of English. For at least the reasons set forth below, Applicants respectfully submit that the obviousness rejections have been traversed.

Neither Miller nor English disclose first identifying sellers among a plurality of sellers based on a first set of criteria, and then further performing a selection of the identified sellers by selecting as a featured seller, from the sellers identified among the plurality of sellers, an identified seller offering the item at the lowest price.

The Office Action alleges that Miller discloses the elements of “selecting as the featured seller of the item the identified seller that is offering the selected item at the lowest price”, arguing that paragraphs [0172] and [0178] disclose that the selection of the vendor can be based on price. The Office Action further alleges that it would have been obvious to one of ordinary skill in the art to apply the criteria of Miller and include the score of English to identify sellers.

Applicants initially note that with respect to identifying a seller offering the lowest price for an item and using the identification to select the lowest price seller as a featured seller as claimed, the citation relied upon in the Office Action (Miller, [0172]-[0178]) fails to disclose the foregoing elements. Instead, Miller states that “price” can be a criterion for selecting a vendor, without discussing how (e.g., without mentioning that the seller with the lowest price is identified).

In particular, Paragraph [0172] of Miller recites “criteria for selecting the vendor include one or more of: price of the product(s), proximity to the vendor, availability of delivery, whether the products are in stock, wrapping availability, shipping availability, tracking availability, and a loyalty program.” Paragraph [0178] of Miller recites “the criteria for selecting the vendor includes at least one of price, proximity to the vendor, availability of delivery, whether the

products are in stock, wrapping availability, shipping availability, tracking availability, and a loyalty program.”

Further, even assuming that the score of English were included in the criteria of Miller, and even further assuming that Miller disclosed identifying a seller offering the lowest price for an item the result would still not provide the claimed invention. For example, the combination of Miller and English would still fail to disclose at least the feature of performing a first identification of sellers of an item using a set of criteria, and *then* selecting a featured seller from those identified sellers using lowest price for the item.

While the Office Action alleges that the claim did not recite the foregoing language, Applicants respectfully contend that the language of the claim as previously pending provided that the method first identified sellers based on the three recited criteria (sellers (1) that are offering the item for sale, (2) whose availability level for the item exceeds a predetermined availability threshold, and (3) having a seller score relating to a plurality of different items offered for sale by the seller that exceeds a predetermined score threshold), and from the identified sellers performed a further selection by selecting from the sellers identified among the plurality of sellers as the featured seller of the item the identified seller that is offering the item at the lowest price.

Nonetheless, in order to expedite allowance of the claim, Claim 3 has been amended to further clarify that the selection is performed from the sellers identified among the plurality of sellers using the enumerated criteria.

In contrast with the method of Claim 3, using the method provided by the combination of Miller and English, a different seller would likely be identified as a featured seller if sellers offering the lowest price were first identified, and then from those identified sellers a featured seller was identified based on availability levels and seller scores as compared to the seller that would be identified if sellers were first selected based on availability levels and seller scores, and from the identified sellers a featured seller was selected based on lowest item price.

Further, according to Miller, while sellers offering an item may be identified to a user, the user then apparently has to activate a link (a "Buy It Now" link) for a given seller and navigate through that seller's particular purchase process ("Links 508 to more information are also provided in the information frame. In this example, links to the manufacturer, a features page,

etc. are provided. Several vendors of the product are provided in the section 510 entitled "Buy It Now!" The section 512 entitled "Buy It In Your Neighborhood" lists vendors of the product based on geographic location. Preferably, maps and/or directions to the vendors are made available to the user," Miller, paragraph [0151]). Thus, the combination of Miller and English further fails to teach or suggest "replying to the request for information with a web page containing ... a control that, when activated, adds the item to a shopping cart so that the order will be placed from the featured seller when check out is performed, wherein the user does not navigate to the featured seller Web site to complete the purchase from the featured seller" as recited by amended Claim 3.

Thus, the combination of Miller and English fail to teach or suggest each element of Claim 3, and Applicants therefore request that the rejection of Claim 3 under Section 103(a) be withdrawn.

Dependent Claim 6

Claims 6 depends from Claim 3 and thus, are allowable for at least the same reasons as set forth above in connection with Claim 3. Applicants therefore request that the rejection of Claim 6 under Section 103(a) be withdrawn.

Independent Claim 7

With respect to independent Claim 7, as similarly discussed above with respect to Claim 3, the combination of Miller and English fails to teach or suggest the elements of:

"an identification subsystem, including program code stored computer readable memory that when executed by a processor performs the act of identifying, among a plurality of sellers, those (1) that are offering the item for sale, (2) whose availability level for the item exceeds a predetermined availability threshold, and (3) having a seller score relating to a plurality of different items offered for sale by the seller that exceeds a predetermined score threshold;

a selection subsystem, including program code stored computer readable memory that when executed by a processor performs the act of selecting from the sellers identified among the plurality of sellers as the featured seller of the item the identified seller that is offering the item at the lowest price."

Further, as similarly discussed above with respect to Claim 3, the combination of Miller and English fails to teach or suggest the elements of "wherein the user does not navigate to the featured seller Web site to complete the purchase from the featured seller." Thus, the

combination of Miller and English fail to teach or suggest each element of Claim 7. Applicants therefore request that the rejection of Claim 7 under Section 103(a) be withdrawn.

Dependent Claim 9

Claim 9 recites "wherein the data structure further comprises contents specifying the display of the control that may be activated to display ordering controls that may be activated to order the selected item from a different one of the plurality of sellers other than the distinguished seller". The Office Action fails to even discuss the foregoing elements, and indeed a careful reading of Miller and English fails to disclose specifying the display of the control that may be activated to display ordering controls that may be activated to order the selected item from a different one of the plurality of sellers other than the distinguished seller. For at least the reason that the Office Action has failed to address each element of Claim 9 and has failed to provide a clear articulation of the reasons why the claimed invention would have been obvious, and because the combination of Miller and English fail to teach or suggest the recited elements, the Office Action has failed to make a prima facie case of obviousness.

Applicants therefore request that the rejection of Claim 9 under Section 103(a) be withdrawn.

Independent Claim 58

With respect to independent Claim 58, neither Miller nor English disclose or suggest at least the feature of "selecting as a distinguished seller a seller that is offering the item at a lowest price, offering the item for sale, has an availability level that satisfies a first criterion, and has a seller score that satisfies a second criterion."

Applicants note that with respect to identifying a seller offering the lowest price for an item and using the identification to select the lowest price seller as a distinguished seller as claimed, the citation relied upon by the Office Action (Miller, [0172]-[0178]) fails to disclose the foregoing elements. Instead, Miller states that "price" can be a criterion for selecting a vendor, without discussing how (e.g., without mentioning that the seller with the lowest price is identified). Thus, for at least this reason, the combination of Miller and English fail to teach or suggest each element of Claim 58.

Applicants therefore request that the rejection of Claim 58 under Section 103(a) be withdrawn.

Dependent Claims 4-5

Claims 4-5 depend from Claim 3 and thus, are allowable for at least the same reasons as set forth above in connection with Claim 3. In addition, with respect to Claim 4, the Office Action asserts that because the relied upon references disclose having featured vendors being selected from those that have paid a fee, the "identifying and selecting" occurs before a request is received. However, the act of identifying and selecting referred to in Claim 4 is not performed by merely selecting sellers that have paid a fee. Instead, the method of Claim 4, which depends from independent Claim 3, performs the act of identifying and selecting so as to select item sellers having availability levels and seller scores that satisfy corresponding thresholds, and identifying which of those sellers offers the lowest price, before the request is made by the user. Thus, the combination of Miller and English fails to teach or suggest that the identifying and selecting of Claim 3 is performed before the receiving of Claim 3.

Further, with respect to Claim 4, the Office Action alleges that it "is not clear to one of ordinary skill in the art how the identifying sellers offering and having availability of 'the item' for which a request of information is received before a request is received, i.e. how the computing system would know for which item to check availability levels if a request has not yet been received." However, there are several ways wherein the identifying and selecting can be performed before the receiving. For example, a periodic check with respect to anticipated popular, frequently purchased items can be performed before a particular user requests the item. The information obtained prior to the user request can then be used to identify a featured seller. When a user does order the item, the previously identified featured seller can be identified to the user. By way of further example, a most recently selected featured seller with respect to a previous request can be identified, and the most recently selected featured seller can be used to reply to a subsequent user request. Thus, for at least these reasons, the combination of Miller and English fail to teach or suggest each element of Claim 4.

With respect to amended Claim 5, neither Miller nor English teach or suggest performing the acts of identifying or selecting at a uniform time interval. Instead, the citation relied upon the Office Action, which discloses that the processes illustrated in Figure 11 of Miller is repeated *each time a product identifier is received* appears to teach away from performing the acts of identifying or selecting at a uniform time interval.

Further, as admitted in the Office Action, Miller merely discloses that a featured seller is determined by the paying seller and the most hits. By contrast, Claim 5, which depends from independent Claim 3, determines “a most recently selected featured seller” wherein the featured seller was selected from item sellers having availability levels and seller scores that satisfy corresponding thresholds, and identifying which of those sellers offers the lowest price. Thus, the most recently “selected” seller of Miller is not a “most recently selected featured seller” selected from item sellers having availability levels and seller scores that satisfy corresponding thresholds, and identifying which of those sellers offers the lowest price. Thus, the combination of Miller and English fail to teach or suggest each element of Claim 5.

Applicants therefore request that the rejection of Claims 4 and 5 under Section 103(a) be withdrawn.

Claims 8 and 11

The Office Action rejected Claims 8 and 11 as a group. Each claim is addressed below.

Independent Claim 8

With respect to independent Claim 8, and as similarly discussed above with respect to Claim 3, the combination of Miller and English fails to teach or suggest the elements of “content specifying the display of a shopping cart control that may be activated to add the selected item to a shopping cart to enable the ordering of the selected item from a distinguished one of a plurality of sellers, wherein items from multiple sellers can be added to the shopping cart”. Instead, while sellers offering an item may be identified to a user in Miller, the user then apparently has to activate a link (a “Buy It Now” link) for a given seller and then navigate through that seller’s particular purchase process.

Further, the combination of Miller and English fails to teach or suggest the elements of “the distinguished seller being selected by offering the selected item for sale at the lowest price among those sellers of the plurality (1) that are offering the item for sale, (2) whose availability level for the selected item exceed a predetermined availability threshold, and (3) having a seller score that exceeds a predetermined score threshold”. As similarly discussed above with respect to Claim 3, even if Miller were modified by the disclosure of English as proposed by the Examiner, the resulting method would still not provide the elements of Claim 8. For example, the combination of Miller and English would still fail to disclose performing a first identification

of sellers using a set of criteria, and *then* selecting a featured seller from those identified sellers using lowest price.

Applicants therefore request that the rejection of Claim 8 under Section 103(a) be withdrawn.

Dependent Claim 11

Claim 11 depends from Claim 8 and thus, are allowable for at least the same reasons as set forth above in connection with Claim 8. Applicants therefore request that the rejection of Claim 11 under Section 103(a) be withdrawn.

Dependent Claim 10

Claims 10 depends from Claim 8 and thus is allowable for at least the same reasons as set forth above in connection with Claim 8.

Still further, Claim 10 recites "wherein the data structure further contains contents specifying the display of one or more secondary controls that may be activated to order the selected item from a different one of the plurality of sellers other than the distinguished seller, wherein the control for the distinguished seller is displayed more prominently than the secondary controls". While the Office Action admits that Miller and English fails to disclose that the control for the distinguished seller is displayed more prominently than the secondary controls, the Office Action argues that the difference is only found in the nonfunctional descriptive material.

Applicants respectfully traverse the rejection. For example, as discussed in MPEP Section 2106.01, a computer that recognizes a particular grouping or sequence of musical notes read from memory and thereafter causes another defined series of notes to be played, requires a functional interrelationship among that data and the computing processes performed when utilizing that data. Similarly, in the present case, there is a functional interrelationship among the content and the processes performed when utilizing that content as the data structure includes specifications for the processor to carry out (e.g. displaying the control for the distinguished seller more prominently than the secondary controls).

Applicants therefore request that the rejection of Claim 10 under Section 103(a) be withdrawn.

Dependent Claims 33, 45, and 59

Claims 33, 45, and 59 correspondingly depend from Claims 3, 7, and 58 and thus, are

allowable for at least the same reasons as set forth in connection with Claims 3, 7, and 58. Further, the references relied on in the Office Action fail to teach or suggest that the featured seller is visually emphasized on the web page with respect to other sellers identified on the web page.

In rejecting Claims 33, 45, and 59, the Office Action relies on Figure 5A of Miller, alleging that Office Max as a local seller is visually identified in a separate box that emphasizes Office Max. However, Figure 5A of Miller appears to teach away from the claimed invention. Rather than emphasize a seller selected by identifying sellers based on criteria enumerated in the independent claims, and then performing a selection of the identified sellers by selecting as a featured seller an identified seller offering the item at the lowest price, Miller discloses that instead, the local seller is emphasized. Similarly, English appears to teach away from the claimed invention by disclosing a vendor pays to receive a preferential placement, rather than visually emphasizing a seller selected by identifying sellers based on criteria enumerated in the independent claims, and then performing a selection of sellers identified among the plurality of sellers by selecting as a featured seller an identified seller offering the item at the lowest price. Thus, the combination of Miller and English fail to teach or suggest each element of Claims 33, 45, and 59.

Applicants therefore request that the rejection of Claims 33, 45, and 59 under Section 103(a) be withdrawn.

Dependent Claims 34 and 46

Claims 34 and 46 correspondingly depend from Claims 3 and 7, and thus, are allowable for at least the same reasons as set forth in connection with Claims 3 and 7. Further, the references relied on in the Office Action fail to teach or suggest wherein the availability threshold is settable to different values as claimed. Thus, the combination of Miller and English fail to teach or suggest each element of Claims 34 and 46. Applicants therefore request that the rejection of Claims 34 and 46 under Section 103(a) be withdrawn.

Dependent Claims 40, 41, 52, 53, 66, and 67

Claims 40, 41; 52, 53; 66, and 67 correspondingly depend from Claims 3, 7, and 58 and thus, are allowable for at least the same reasons as set forth in connection with Claims 3, 7, and 58. Further, the references relied on by the Office Action fail to teach or suggest providing a first

plurality of ordering controls corresponding to at least a portion of the plurality of sellers, wherein activation of any of the plurality of controls will cause the item to be added to the same shopping cart as recited by Claim 40. Instead according to Miller, a user then apparently has to activate a link (a "Buy It Now" link) for a given seller and navigate through that seller's particular purchase process ("Links 508 to more information are also provided in the information frame. In this example, links to the manufacturer, a features page, etc. are provided. Several vendors of the product are provided in the section 510 entitled "Buy It Now!" The section 512 entitled "Buy It In Your Neighborhood" lists vendors of the product based on geographic location. Preferably, maps and/or directions to the vendors are made available to the user," Miller, paragraph [0151]). Thus, it appears that each seller has its own shopping cart. Applicants similarly traverse the rejection of Claims 52 and 66.

Similarly, with respect to Claims 41, 53, and 67, the references relied on by the Office Action fail to teach or suggest providing a plurality of ordering controls on a first web page corresponding to sellers other than the featured seller, wherein regardless of which of the plurality of ordering controls is activated, the item is placed in the same shopping cart.

Thus, the combination of Miller and English fail to teach or suggest each element of 40, 41, 52, 53, 66, and 67.

Dependent Claims 35, 47, and 61

Claims 35, 47, and 61 correspondingly depend from Claims 3, 7, and 58 and thus, are allowable for at least the same reasons as set forth in connection with Claims 3, 7, and 58. Further, the references relied on by the Office Action fail to teach or suggest the availability threshold is settable to a time period corresponding to a plurality of days.

While the Office Action admits that Miller and English fail to teach the availability threshold is settable to a time period corresponding to a plurality of days, the Examiner states that English, at paragraph [0062], discloses a threshold settable to different values, and asserts that Callender discloses, at Fig. 7, and paragraphs [0006], [0007], [0026], and [0027] determining item availability, including setting an availability threshold to a time period corresponding to a number of days. The Office Action then alleges that it would have been obvious to apply the technique of Callender to the teachings of Miller/English.

As initial matter, the threshold referred to in English, paragraph [0062], is a user voting threshold ("If desired, instead of a binary, thumbs up/thumbs down rating, the system could enable users to provide a rating on a scale, such as from 1-10, or A-F. In such a case, the system could provide information about alternative vendors when the rating is below a certain threshold level"). Thus, it would not make sense and would serve no purpose to make the threshold settable to a time period of any type, much less a time period corresponding to a plurality of days.

Still further, the Office Action appears to have inadvertently mischaracterized Callender. The Callender citations relied upon fail to mention any threshold, much less an availability threshold. The Callender citation is instead directed to determining a probability related to when an item will be available for purchase at a store ("For example, retailer A has a 90% probability of having 2 units in stock today at location X and an 80% probability of having 1 unit in stock tomorrow at location Y.", Callender, [0027]). No threshold is mentioned.

Thus, even if the disclosure of Callender would be combined with that of Miller/English, the result would still not provide an availability threshold is settable to a time period corresponding to a plurality of days.

Applicants therefore request that the rejection of Claims 35, 47, and 61 under Section 103(a) be withdrawn.

Conclusion

In view of the foregoing, Applicants respectfully submit that independent Claims 3, 7, 8, 58, are patentably distinct over the cited art and are in condition for allowance. Claims 4-6, 33-44; 45-57; 59-70, which respectively depend from Claims 3, 7, and 58, are believed to be patentable for the same reasons articulated above with respect to Claims 3, 7, and 58, and because of the additional features recited therein. Applicants therefore respectfully request allowance of Claims 3-11 and 33-70.

Request for Interview

Pursuant to M.P.E.P. § 713.01, in order to expedite prosecution of this application, Applicant's undersigned attorney of record hereby formally requests a telephone interview with the Examiner as soon as the Examiner has considered the effect of the arguments presented above. Applicant's attorney can be reached at (310) 407-3461 or at the number listed below.

Application No.: 10/750,163
Filing Date: December 31, 2003

No Disclaimers or Disavowals

Although the present communication may include alterations to the application or claims, or characterizations of claim scope or referenced art, Applicant is not conceding in this application that previously pending claims are not patentable over the cited references. Rather, any alterations or characterizations are being made to facilitate expeditious prosecution of this application. Applicant reserves the right to pursue at a later date any previously pending or other broader or narrower claims that capture any subject matter supported by the present disclosure, including subject matter found to be specifically disclaimed herein or by any prior prosecution. Accordingly, reviewers of this or any parent, child or related prosecution history shall not reasonably infer that Applicant has made any disclaimers or disavowals of any subject matter supported by the present application.

Co-Pending Applications of Assignee

Applicants wish to draw the Examiner's attention to the following co-pending applications of the present application's assignee.

Serial Number	Title	Filed
11/747,957	PROFILING ITEM SELLERS TO INFORM ITEM PURCHASING DECISIONS AND BUILD TRUST IN A MULTIPLE-SELLER MARKETPLACE	May 14, 2007

Please charge any additional fees, including any fees for additional extension of time, or credit overpayment to Deposit Account No. 11-1410.

Respectfully submitted,

KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: December 11, 2008

By: 

David N. Weiss
Registration No. 41,371
Attorney of Record
Customer No. 20995
(310) 551-3450